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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 163

JAMES D. RUSSO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

This memorandum is submitted in support of the petition for a writ of certiorari herein and in reply to the Brief for the United States in Opposition.

POINT I

Contrary to respondent's position there are numerous issues of fact in the record which render the opinions of the Courts below erroneous in their failure to require a hearing.

A. The Record Does Disclose Affirmative Acts of Deception by the Government Agents.

Contrary to the assertions contained in the Brief of the Government in opposition to the instant petition (p. 8, *et seq.*) the record discloses patent documentary acts of deception in addition to those which are clearly described in the moving papers below and may be inferred from the course of conduct of the agents and the individual William Mack.

One such document is the letter dated July 12, 1954 (App. 15a, *et seq.*) from the District Director of Internal Revenue. Despite the fact, as is now known, that a joint fraud investigation was in progress, the agents contrived to have a letter from the office of the District Director of Internal Revenue sent to the subject of their investigation directing him to communicate with Internal Revenue Agent Thomas J. Ginnane and stating that the purpose therefor was the examination and audit of his returns. This routine type letter manifestly created the impression that an *Internal Revenue* Agent was conducting an examination rather than the true state of affairs, to wit, that a *Special* Agent was conducting a criminal investigation. The letter also requests that reply be addressed to the Audit Division and not to the Intelligence Division at a street address which was not then the Headquarters of the division of the Internal Revenue Service concerned with the investigation of tax fraud.

The atmosphere of a civil tax examination was again created by the manner in which an Internal Revenue Agent rather than a Special Agent prepared and executed a receipt for certain papers which had been delivered. In this receipt (App. 17a) the Revenue Agent referred to the proceeding as a tax examination rather than as an investigation or fraud investigation.

To this very last stage of the case, the respondent has never attempted to give any explanation concerning these documents.

Both these documents are devoid of any mention or indication of a Special Agent in the case or of the true nature of the endeavor of the agents. The distinction between the roles of an Internal Revenue Agent and a Special Agent is made clear in the Official Manual of the Internal Revenue Service and is noted in the opinion of the Court of Appeals in the instant case. *U. S.* v. *Wolrich*, 130 F. Supp. 528 (S.D.N.Y., 1955); *U. S.* v. *Lipshitz*, 132 F. Supp.

519 (E.D.N.Y. 1955). Disclosures in the course of a civil audit, which is the appearance given the investigation here, were compelled by statute. I.R.C. 1939, Sec. 3615; I.R.C., 1954, Sec. 7602 *et seq.*

Certainly many more glaring and patent instances of deception would appear in the record but for the denial in the District Court of petitioners' motion to examine William Mack before trial. This denial was characterized as erroneous by the Court of Appeals, and any hiatus in the record in that respect ought not be laid at the feet of petitioner. It hardly lies in the mouth of the government to belittle, from its position of strength, the unsuccessful efforts of petitioner to obtain Mack's testimony when the power to obtain and produce such testimony was available to the Internal Revenue Service throughout, I.R.C. 1954, Sec. 6001, 7602, 7605 and to the United States Attorney under Grand Jury subpoena powers.

B. There Was No Representation by Counsel in Relation to Petitioner's Personal Income Tax.

On the basis of the record, it is clear that the engagement of Frank Paulo, Esq. had a sole and exclusive relationship to the investigation of appellant's acts with respect to income tax returns which he had prepared for persons other than himself (App. 33a, 36a). Justice Paulo withdrew from the matter when it appeared that appellant's personal returns entered into the investigation (App. 34a) and properly so (App. 37a, 41a).

From the affidavit of Frank Paulo, now a sitting Justice of the Municipal Court of the City of New York, it is clear that any conclusion of fact that he gave permission to an agent to examine records would be incorrect (App. 34a, 35a). Justice Paulo states:

"7. Mr. Foley from time to time would make inquiries of your deponent as to when he could examine the books and records of Mr. Russo. His requests

would be referred to Mr. Mack. On two occasions Mr. Foley had spoken to your deponent about tax waivers which were forwarded to Mr. Foley from Mr. Russo through your deponent's office. There may have been occasions when your deponent notified Mr. Mack by telephone that Mr. Foley wanted to examine certain books or wanted certain papers in connection with his examination, but so far as your deponent is concerned, Mr. Mack was in complete and entire charge of the examination."

The finding of the Court of Appeals that Justice Paulo dropped out of the case by December 1954 (Pet., p. 30) differs from the record. Judge Paulo ascended the bench on May 18, 1954, some seven months prior to the date stated in the opinion (App., 33a). But much more important is the erroneous implication in the opinion that Justice Paulo played any part at all in the case of Russo's personal income tax returns. The affidavit of Justice Paulo is clear, however, that this is not the case:

"* * * Mr. John Foley, a representative of the Bureau, advised your deponent that he had been instructed to audit Mr. Russo's personal returns and his books and records. That later your deponent communicated this fact to Mr. Russo and arrangements were made whereby Mr. Russo engaged William Mack as an accountant with respect to the examination being made by Mr. Foley.

"6. Your deponent at no time thereafter, except for the instances that will hereinbelow be noted, did any of the work in connection with the examination of Mr. Russo's personal tax returns or books and records. Any conferences that were held with any representatives of the Bureau, with respect to the examinations, were with Mr. Mack. All work sheets prepared and other work done in connection with the examination of Mr. Russo's books and records were

done by Mr. Mack in conjunction with representatives of the Bureau. At no time was your deponent present at any of these conferences, nor did your deponent at any time inspect or see any of the work sheets prepared, nor did your deponent in any way take part in any of the examinations of Mr. Russo's personal tax returns or the presentation of Mr. Russo's case in connection with said returns. The reason for suggesting to Mr. Russo that he engage an accountant when your deponent was notified by Mr. Foley of the impending examination of Mr. Russo's personal tax returns and books and records was that your deponent did not possess the requisite accounting knowledge and, therefore, did not feel qualified to handle the matter." (App. 33a-34a)

Petitioner's evidence is to the same effect (App. 36a, 37a).

It is respectfully submitted that the sentence in the opinion of the Court of Appeals relating to Justice Paulo, stating, "Moreover it is clear that any evidence transmitted in 1953 was with the sanction of Russo's attorney, Paulo" is not established by the record, since Justice Paulo's affidavit states categorically:

"8. That as far as any disclosures made by Mr. Mack concerning Mr. Russo's affairs, deponent had no part in such disclosures in any manner. Your deponent was not present at any disclosures, and he did not supervise them.

"9. The retention of Mr. Mack by Mr. Russo did not involve Mr. Mack working under deponent's direction or supervision in any way, nor was he compensated by your deponent in any way. At the time Mr. Mack was not in any sense a part of deponent's office staff and had his own office at another address." (App. 35a.)

Since the affidavits of Justice Paulo and Revenue Agent Foley are inconsistent, it is apparent that the inconsistency should have been resolved at a hearing.

The opinion of the Court that disclosures were voluntary, in so far as it is based on a misapprehension that the appellant had the advice of counsel, is thus unwarranted by the record.

C. Petitioner Made No Voluntary Disclosures in Relation to His Personal Income Tax.

So long as the Special Agent's true interest in Mr. Russo's personal returns remained undisclosed and the Revenue Agents concealed the true nature of the investigation by means of their own identity as Internal Revenue Agents rather than as pawns for the Special Agent, any consent to the surrender of documents or disclosure of information must be deemed involuntary because of the provisions of the Internal Revenue Code requiring such disclosures to Internal Revenue Agents conducting a routine audit. Int. Rev. Code 1939, Sections 54, 3614, 3615; Int. Rev. Code, 1954, Sections 6001, 7602, 7605. Similarly, surrender of documents and disclosures elicited by means of a latent illegality will vitiate any superficial appearance of consent. Such surrender of documents and disclosure of information is deemed voluntary only in the same sense that the submission to the imminent assertion of the force of law or under circumstances appearing to be different from what they are, is consensual. *Union P. R. Co.* v. *P.S.C.*, 248 U. S. 67, 70, 63 L. Ed. 131 (1918); *U. S.* v. *Lantrip*, 74 F. Supp. 946, 949 (E. D. Ark. 1948) and cases cited therein; *U. S.* v. *Gross*, 137 F. Supp. 244 (S.D.N.Y., 1956).

As appears from the discussion on pages 23 *et seq.* of the petition herein it may not be contended that petitioner has waived his rights.

POINT II

The manifest illegality which permeates the conduct of Mack and the Government Agents is not relieved by I.R.-MIM. No. 58, relied on by respondent.

In the second point of the Brief in Opposition (pp. 10 *et seq.*) respondent doubts whether petitioner seriously urges that representation by counsel was inadequate because the attorney had no "treasury card." Of course, petitioner has never urged this and in so describing petitioner's argument respondent is indulging in the pastime of erecting and dismantling strawmen.

It has always been petitioner's argument that Justice Paulo's role related solely and exclusively to the matter of the returns prepared by petitioner for other taxpayers and not to the returns of petitioner himself. Petitioner has not claimed he was not adequately represented by counsel but that he was not represented by counsel at all, where here relevant. Justice Paulo's failure to have qualified for admission to practice before the Treasury Department and his incompetence to handle tax matters explain his withdrawal from petitioner's representation when an interest of the Internal Revenue Service in petitioner's own returns was first made manifest (App. 33a, 34a).

In any event respondent's failure to meet the briefed issue of illegality and its preference for expressing doubts about what petitioner seriously intends amounts to a confession of error in relation to the matter of the illegality which infected this investigation.

Petitioners position that illegality permeated this investigation is most seriously urged on pages 13 *et seq.* of the Petition.

Even if a mere administrative fiat were in any way binding upon this Court the I.R. Mimeograph relied upon by

the Government (Opp. Br. pp. 11 *et seq.*) does not contravene any position taken by petitioner. A reading of the portion of the mimeograph immediately preceding that quoted in the Government's Brief, but omitted by them, discloses that the dealings of the Agents with Mack were also prohibited by this regulation. The portion of the mimeograph omitted by the Government reads as follows:

> "* * * However, unless properly entrolled and authorized to represent the taxpayer before the Treasury Department with respect to the tax involved in the examination, such lawyer or accountant may not be heard as the taxpayer's representative in advocating, in those cases where issues or controversies have arisen out of the factual development of such cases, the adoption of any particular position with respect to such issues or controversies. In short, the difference may be summarized by distinguishing activities in the capacity of witness—or one who assists in the factual development of a case—and activities in the capacity of advocate—or one who acts in behalf of the taxpayer in urging a particular determination with respect to the issues or controversies which have arisen out of the factual development of a case * * *." I.R.-MIM. 58, 1952-2 Cum. Bull. 2-A P-H Fed. Tax Service Par. 21, 254-A.

Thus, since Mack was the appellant's representative in advocating the adoption of particular positions with respect to issues and controversies (App. 7a, 9a and 12a), then even under a view most favorable to the Government, the conduct of Mr. Mack and the Agent falls within every definition of forbidden practice.

Mr. Mack's conduct, even as described by him in an affidavit procured by Special Agent Skolnick, appears minimally to have consisted in obtaining information on behalf of the Revenue Service in support of a criminal

charge and without the knowledge of the appellant (App. 9a-12a). This is hardly the role of a witness contemplated in the mimeograph.

Conclusion

Respondent's position that there were no issues of fact in relation to the deceptive acts of Government Agents, the representation of petitioner by counsel and the nature and circumstances of petitioner's disclosure is contrary to the record.

The illegality permeating the investigation which petitioner seriously urges is not excused by any administration mimeograph.

Respectfully submitted,

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September 1957.